# *Smith v The Appeal Commission*: Manitoba Court of Appeal Clarifies the Impact of a Statutory Appeal Clause on the Right to Seek Judicial Review

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In its recent decision, *Smith v The Appeal Commission,* 2023 MBCA 23, the Manitoba Court of Appeal has confirmed that the mere existence of a statutory appeal clause does not preclude a party to an administrative decision from simultaneously seeking judicial review.

In that case, the appellant, Smith, had been denied coverage by the respondent for her prescription medical cannabis under the Manitoba Compensation for Victims of Crime Program.

*The Victims' Bill of Rights*, CCSM c V55 (the "VBR") provided Smith with the right to appeal that denial to the Court of King's Bench, but only on questions of law or jurisdiction. Smith applied to the Court of King's Bench, seeking to both appeal and judicially review the denial simultaneously. Before the application judge, she acknowledged that her best argument was on judicial review – that is, that the denial was unreasonable and ought to be set aside.

As the Manitoba Court of Appeal explained in its reasons, the "idea of one proceeding combining a judicial review and a statutory appeal … troubled the application judge". Ultimately, the application judge concluded that the statutory appeal clause insulated the denial from other forms of review. As a result, he refused to judicially review the denial and dismissed Smith's application.

Smith appealed to the Manitoba Court of Appeal. She argued that the application judge erred in interpreting the statutory appeal clause to preclude judicial review. In unanimous reasons, the Court of Appeal agreed – the mere existence of a narrow statutory appeal clause does not extinguish an individual's ability to simultaneously challenge other aspects of an administrative decision through judicial review. Ultimately, the Court of Appeal accepted Smith's arguments on the merits of the judicial review, quashed the denial as unreasonable and ordered that Smith be reimbursed for her prescription medical cannabis in accordance with the VBR.

## Key Takeaways

The Court of Appeal's decision in *Smith* provides valuable clarification for parties to

 

administrative proceedings and administrative lawyers in Manitoba. Where a narrow statutory appeal clause exists, without more, an applicant is not precluded from simultaneously seeking judicial review of the merits of the decision. As the Court of Appeal explained, the first step for a reviewing judge in such circumstances would be to "sort the questions" at issue into those that are the subject of the appeal clause and those that are the subject of judicial review to ensure that the proper standards of review are applied to each category in accordance with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

**Unsettled Questions**

Notably, however, the Court of Appeal's reasons also highlight two issues in administrative law that remain unresolved post-*Vavilov*.

First, it is unclear to what degree a legislature can constitutionally limit the scope of judicial review through a true privative clause. As the statutory appeal clause at issue in *Smith* did not expressly preclude judicial review, that issue was identified, but not determined, by the Court of Appeal.

Second, it should be emphasized that the statutory appeal clause at issue in *Smith* provided a right to appeal to the Court of King's Bench. This meant that Smith's appeal and judicial review could be brought before the same court simultaneously. Procedural issues relating to bifurcation of proceedings may still arise where a statutory appeal clause instead provides for an appeal directly to the Court of Appeal, while any judicial review would need to be heard by the Court of King's Bench.

As post-*Vavilov* jurisprudence continues to develop in Manitoba, these issues will undoubtedly require further consideration and resolution in the future.

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